STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 17, 2009
v	No. 285101 Lenawee Circuit Court
DOUGLAS EUGENE CAMP, Defendant-Appellant.	LC No. 07-012858-FC

Before: Sawyer, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a). He appeals as of right. Because we conclude that defendant's retrial was prohibited by double jeopardy protections, we reverse defendant's CSC II conviction.

I. Relevant Facts

Defendant was charged with ten counts of first-degree criminal sexual conduct (CSC I) and five counts of CSC II. The victim of the 14 charges was defendant's 12-year-old adopted nephew, AK. The sexual abuse occurred during a camping trip in Lenawee County. In a separate case in Livingston County, defendant was charged with four counts of CSC I and two counts of CSC II. The victims of these 6 charges were AK and AK's 11-year-old foster brother, SH. The Livingston County case proceeded to trial, and a jury acquitted defendant of the six charges.

The present case then went to trial before a jury. The first witness was Tammie Kurth, AK's adopted mother and defendant's sister. She testified that one evening, a few months after defendant's and AK's camping trip, she discovered AK and SH, in their bedroom, naked from the waist down, "messin' around." Kurth sent her husband to speak to AK and SH, and AK disclosed that he had learned the behavior from defendant. Kurth drove to defendant's house, where she "asked him what he'd been doin' to [her] boys." Defendant denied doing anything improper, but Kurth kept telling defendant "that they [AK and SH] said he had been molesting them."

Kurth testified that, after reporting the abuse to SH's guardian ad litum, she contacted a lawyer. The lawyer took her, along with AK and SH, to the local police department. The

prosecutor then asked Kurth, "After a police report had been made, what, if anything, happened?" Kurth replied, "Well, it eventually went to trial in Livingston County. I don't--".

Defendant immediately requested a bench conference, where the following conversation took place:

> *Defense Counsel*. I'm [sic] wanna move for a mistrial, or I'm gonna ask you that now that she's opened the door that--
>
> *Trial Court*. I think she has opened the door. Do you want the mistrial?
>
> *Defense Counsel*. Well, an alternative would be we can announce to the jury and you can let me introduce the not guilty verdict.
>
> *Trial Court*. Oh, I think you--I think now you've got a right to do that. I think it's been kicked open.

The trial court then excused the jury and took a five-minute recess.

When the parties returned to the courtroom, the trial court attempted to learn the precise remedy that defendant was requesting:

> *Trial Court*. Mr. Gatesman [defense counsel], What are you asking? You made the objection, and we've taken a recess. What is it that you want?
>
> *Defense Counsel*. Well, Judge, I think that what is in front of the jury now is a previous jury trial, and I think that the jury should know about the verdict in that trial.
>
> *Trial Court*. What is it you want? Are you asking for a mistrial? Are you asking for--what? I don't know. I just want to know what is it you're asking for.
>
> *Defense Counsel*. I would ask that I have a certified copy of the--of the not guilty verdict regarding [SH and AK] in the Livingston County case. I'd ask that be admitted to the--to the jury at the appropriate time, or in the alternative a mistrial if the Court's not inclined to grant that request.

The prosecutor asked the trial court not to grant "that request" because Kurth's answer was nonresponsive, explaining that AK's evaluation at the University of Michigan, rather than the trial in Livingston County, was the event that occurred after the police report was made. The trial court disagreed: "After you file a report, what, if anything, happened? It came to trial. Isn't that responsive? It strikes me as being a response." Thus, it found that the prosecutor "created the error."

The trial court still, however, needed to decide the appropriate remedy:

> *Trial Court*. I don't know what the appropriate remedy is. I think you have a right to bring out what the results of that trial was, yes.

* * *

Trial Court. . . . Y'know, when we have the trial in front of 'em, I don't know how we cannot go on there.

* * *

Trial Court. . . . If you [the prosecutor] can think of another remedy, I can't think of another remedy. If I grant a mistrial, I'm convinced that the Court of Appeals will say that he's in--he's had jeopardy and you won't be able to try it again.

Prosecutor. Well, quite frankly, Your Honor, you put a not guilty in front of this jury, I don't how--see how that's gonna be any different.

* * *

Trial Court. Let's face it, as I see it, if I grant [defendant's] request [to inform the jury of the not guilty verdict], I agree with you, Ms. Schaedler [the prosecutor], your case is devastated. Is that a fair statement?

Prosecutor. I believe so, Your Honor, and I believe that this young man has at least the right, absent any error that the Court found on my part, has the right to have a jury hear this case without prejudice. And we didn't bring in the 40B--404B [evidence] because we wanted to try it clean.

Trial Court. Mr. Gatesman, I'll give you your last--last voice on this issue. Anything further you wish to say?

* * *

Defense Counsel. Okay. Well, we can't unring that bell. I hate to be trite about this, but we can't. And I think the Constitution mentions the Defendant, y'know, the People may have a statutory right to a jury trial, but the only remedy is for the jury to know what happened in the Livingston County case. That's the only way to clear that up. And I'm asking the Court to--to allow the admission of that verdict as to the complainants in that case, or in the alternative a dismissal of the charge--of all the charges in both cases.

Trial Court. Thank you. Well, I agree with you. I don't know how we can unring the bell.

These charges are very serious. I think that we should have a clean trial. I'm going to grant a mistrial. . . .

Defendant subsequently moved the trial court to dismiss the charges in the present case based on double jeopardy grounds. He argued that manifest necessity did not require a mistrial, claiming that after the trial court granted his request to inform the jury of his acquittal in the Livingston County case, less drastic remedies, such as a curative instruction, were available to

cure any prejudice to the prosecution. In response, the prosecutor claimed that manifest necessity existed because Kurth's testimony, standing alone, deprived defendant of a fair trial. The prosecutor also claimed that introducing evidence of the acquittal "would have compounded the unfairness of the trial by deliberately introducing additional inadmissible evidence." The prosecutor further argued that defendant consented to the mistrial. He claimed that, at the very least, defendant's final request to introduce the acquittal or dismiss the charges put the trial court in the untenable position of introducing plainly inadmissible evidence or terminating the trial.

The trial court denied the motion to dismiss:

> Well, my concern in this case is the victims--the victim and society in general that I think is entitled to a trial, a fair trial. Putting this verdict in I think deprived the prosecutor of a fair trial.
>
> Defendant did say, well, I want a mistrial unless we get the verdict in, which I think is a consent to it.
>
> We got in a mess, and I think it--no question I thought then and I think now of manifest necessity that we grant a mistrial at that time.
>
> We can punish the prosecutor for violating a court order through negligence or whatever, but the victim and society have some rights, and I don't think that it's fair to punish the victim, to punish the public as a whole by . . . prohibiting a retrial when the circumstances that we were in made it manifestly necessary that we grant a mistrial and in essence was consented to by the Defendant.

At the conclusion of the retrial, defendant was convicted of one count of CSC II.

II. Double Jeopardy

Defendant argues that his retrial violated his state and federal protections against double jeopardy. Specifically, defendant claims that he did not consent to the mistrial and there was no manifest necessity for the mistrial. A double jeopardy claim is a question of law that is reviewed de novo. *People v Grace*, 258 Mich App 274, 278; 671 NW2d 554 (2003).

Under the Double Jeopardy Clauses of the United States Constitution, US Const, Am V, and the Michigan Constitution, Const 1963, art 1, § 15, an accused may not be put in jeopardy twice for the same offense. *Grace, supra* at 278. In a jury trial, jeopardy attaches when the jury is selected and sworn, *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997), and once jeopardy has attached, a defendant has a constitutional right to have his case decided by that tribunal, *People v Dry Land Marina, Inc*, 175 Mich App 322, 325; 437 NW2d 391 (1989). If a trial concludes prematurely, double jeopardy may prohibit a retrial. *People v Dawson*, 431 Mich 234, 251; 427 NW2d 886 (1988).

> The Double Jeopardy Clause does not bar all retrials. The Supreme Court of the United States has held that the charged offense may be retried where the mistrial was declared because of a hung jury. The Court has fashioned a

> balancing test focusing on the cause prompting the mistrial. The thrust of the Court's decisions is that the Double Jeopardy Clause does not bar retrial where the prosecutor or judge made an innocent error or where the cause prompting the mistrial was outside their control. Where the motion for mistrial is made by the prosecutor, or by the judge sua sponte, retrial will be allowed if declaration of the mistrial was "manifest[ly] necess[ary]" . . . .
>
> Where the motion for mistrial was made by defense counsel, or with his consent, and the mistrial was caused by innocent conduct of the prosecutor or judge, or by factors beyond their control, or by defense counsel himself, retrial is also generally allowed, on the premise that by making or consenting to the motion the defendant waives a double jeopardy claim. [*Id.* at 252-253.]

"Thus, when a mistrial is declared, retrial is permissible under double jeopardy principles in two circumstances: (1) where there was 'manifest necessity' to declare the mistrial or (2) where the defendant consented to the mistrial and was not goaded into consenting by intentional prosecutorial misconduct." *People v Tracey*, 221 Mich App 321, 326; 561 NW2d 133 (1997).

A. Consent

We begin with determining whether defendant consented to the mistrial. During the trial court's conversations with the parties about the appropriate remedy for Kurth's mention of the Livingston County trial, defendant offered three potential remedies: (1) a mistrial; (2) informing the jury of his acquittal; and (3) dismissal of the charges. If a defendant consents to the discontinuation of trial, he has consented to a mistrial. *Tracey*, *supra* at 328-329. The *Tracey* Court explained:

> The[] authorities indicate that it is the waiver of this particular interest—a defendant's "right to have his trial completed by a particular tribunal"—that makes retrial permissible under double jeopardy principles. Thus, the essential issue in determining whether a defendant consented to a mistrial and is accordingly subject to retrial is whether the defendant waived this right. [*Id.*]

Considering the entire exchange between the parties and the trial court, we conclude that (1) the trial court agreed with defendant that he had a right to inform the jury that he had been acquitted in the Livingston County trial, (2) the prosecutor implicitly requested a mistrial when she stated that placing the acquittal before the jury was "so prejudicial as opposed to probative" and that AK was entitled to have an unprejudiced jury hear the case, and (3) the trial court granted the mistrial because informing the jury of the acquittal would "devastate[]" the prosecution's case. Thus, it was not defendant's request for a mistrial that was granted; rather, it was the prosecutor's implied request for a mistrial that was granted by the trial court.[1]

[1] We acknowledge that defense counsel's initial reaction was to request a mistrial and that counsel subsequently advanced a variety of alternatives. Ultimately, however, counsel's first preference was to continue the trial with the jury being informed of defendant's acquittal in the Livingston County trial.

Defendant did not consent to the prosecutor's request. Defendant, because the trial court had granted his request to inform the jury of his acquittal in the Livingston County trial, no longer had a need to object to having his trial completed before the jury that heard Kurth's testimony. Consequently, we conclude that defendant did not consent to the mistrial.

B. Manifest Necessity

Because defendant did not consent to the mistrial, double jeopardy barred a retrial unless there was "manifest necessity" for the mistrial. *Tracey*, *supra* at 326. There is no precise test for what constitutes manifest necessity; it is usually determined on a case-by-case basis, *People v Booker (After Remand)*, 208 Mich App 163, 172-173; 527 NW2d 42 (1994), and the prosecutor must demonstrate a "high degree" of necessity, *Arizona v Washington*, 434 US 497, 506; 98 S Ct 824; 54 L Ed 2d 717 (1978). This Court has previously stated that manifest necessity "appears to refer to the existence of sufficiently compelling circumstances that would otherwise deprive the defendant of a fair trial or make its completion impossible." *People v Rutherford*, 208 Mich App 198, 202; 526 NW2d 620 (1994). However, "[n]either party has a right to have his case decided by a jury which may be tainted by bias," *Arizona*, *supra* at 516, and the public interest in allowing the prosecution to have a full and fair opportunity to try the defendant before an impartial jury may trump the defendant's right to have his trial completed by a particular tribunal, *id.* at 505. A trial court's determination that manifest necessity, based on jury bias, necessitates a mistrial is entitled to great deference. *Id.* at 510-511.

Defendant was prejudiced when Kurth referred to the Livingston County trial. Kurth was the prosecution's witness, and she mentioned the Livingston County trial in response to an open-ended question by the prosecutor. Thus, the prejudice caused by Kurth's testimony was attributable to the prosecutor.[2] A curative instruction, and one that did not mention the outcome of the Livingston County trial, could have cured the prejudice to defendant. Jurors are presumed to follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and instructions are presumed to cure most errors, *People v Chapo*, 283 Mich App 360, 370; 770 NW2d 68 (2009). In fact, instructions may be sufficient to cure the prejudice to a defendant resulting from the improper admission of bad-acts evidence. See *People v Horn*, 279 Mich App 31, 35-36; 755 NW2d 212 (2008) (holding that if the prosecutor did improperly elicit bad-acts evidence, the trial court's instructions on the proper use of bad-acts evidence was sufficient to cure the error); *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) (holding that an exchange between the prosecutor and a witness which involved bad-acts evidence was not so prejudicial that the prejudicial effect was not cured by the trial court's instruction to ignore the exchange).[3] Here, if the trial court had immediately instructed the jury to ignore Kurth's

[2] The prosecutor informed the trial court that Kurth had been informed not to mention "what had happened with [SH]," but did not know whether Kurth had been told that she could not talk about the Livingston County trial. While the trial court stated that Kurth "sure should have been" told that she could not mention the Livingston County trial, it never made a finding that the prosecutor intended to elicit any testimony about the Livingston County trial.

[3] See also *Arizona*, *supra* at 521 n 5 (Marshall, J., dissenting,) ("[I]t must be recognized that the cases are legion in which convictions have been upheld despite the jury's exposure to improper material relating to the defendant's past conduct, often because curative instructions have been

(continued…)

mention of the Livingston County trial and that it was to decide the case based solely on the evidence admitted in the case, the prejudicial effect of Kurth's testimony to defendant would have been cured. Accordingly, there were no compelling circumstances that would have deprived defendant of a fair trial.

Even if the prejudice resulting from Kurth's mention of the Livingston County trial could have only been cured by an instruction that informed the jury that defendant had been acquitted of the charges in the Livingston County case, as was believed by defendant and the trial court, plaintiff has not shown that such an instruction would be so prejudicial to the prosecution that a mistrial was required. Defendant's acquittal in the Livingston County trial may have been inadmissible as irrelevant evidence. See *People v Bolden*, 98 Mich App 452, 461-462; 296 NW2d 613 (1980) ("The fact that another jury harbored a reasonable doubt as to defendant's guilt of the other offense does not negate the substantive value of the testimony to establish identity, scheme, plan . . . . The issue should not be clouded by encouraging speculation regarding the verdict reached in a separate trial on a separate offense . . . .).[4] But, as already stated, instructions are presumed to cure most errors, *Chapo*, *supra*, and jurors are presumed to follow their instructions, *Graves*, *supra*. We believe that a carefully crafted curative instruction, which would have included instructions that the Livingston County trial involved different allegations, that the jury's deliberations and credibility determinations in the present case must be based only on the evidence presented, and that the acquittal in the Livingston County trial was not evidence and must not be considered by the jury, would have been sufficient to alleviate any prejudice the prosecution suffered upon the jury learning that defendant had been acquitted of the charges in the Livingston County trial. Plaintiff has not presented us with any argument or legal authority to suggest otherwise. Accordingly, plaintiff has failed to demonstrate a "high degree" of necessity for a mistrial, and the trial court abused its discretion in determining that manifest necessity required a mistrial.

Because defendant did not consent to the mistrial and the mistrial was not supported by manifest necessity, the retrial violated defendant's constitutional double jeopardy protections. We, therefore, reverse defendant's CSC II conviction.[5]

Reversed.

/s/ David H. Sawyer
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra

(…continued)

found sufficient to dispel any prejudice.").

[4] But see *People v Nabers*, 103 Mich App 354, 364; 303 NW2d 205 (1981), rev'd on other grounds 411 Mich 1046 (1981) (agreeing with the dissent in *Bolden* that, if the defendant has been acquitted of similar acts, a defendant should be allowed to inform the jury of the acquittal).

[5] Because we reverse defendant's conviction on double jeopardy grounds, we need not address defendant's other arguments on appeal.